

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Antonio Jones

v.

Case No. 15-cv-83-PB

Esker L. Tatum, Jr.

REPORT AND RECOMMENDATION

Antonio Jones is currently incarcerated in the Federal Correctional Institution in Berlin, New Hampshire, serving a 151-month sentence for sex trafficking imposed by the U.S. District Court for the Eastern District of New York. He petitions this court for a writ of habeas corpus, pursuant to 28 U.S.C. §§ 2241 & 2255(e). Before this magistrate judge for a report and recommendation is respondent's motion to dismiss, which is unopposed. For the reasons that follow, respondent's motion to dismiss should be granted.

Background

Under a plea agreement, Jones was convicted of violating 18 U.S.C. §§ 1591(a)(1) and (2). Those statutes, in turn, make it a crime to: (1) engage in the sex trafficking of children by force, fraud, or coercion; or (2) benefit from participating in

such activity. Jones's plea agreement includes the following provision:

The defendant agrees not to file an appeal or otherwise challenge, by petition pursuant to 28 U.S.C. § 2255 or any other provision, the conviction or sentence in the event that the Court imposes a term of imprisonment of 168 months or below. This waiver is binding without regard to the sentencing analysis used by the court.

Pet. (Doc. No. 1 at 15, 20). The district court sentenced Jones to 151 months of incarceration.

Jones does not indicate whether he has either: (1) appealed his conviction or sentence; or (2) petitioned for relief under § 2255. In any event, he contends that his § 2241 petition in this court is permitted by the so-called savings clause contained in § 2255(e). In his petition, Jones raises six grounds for relief. They include: purported errors in calculating his offense level under the federal sentencing guidelines (grounds one and three),¹ claims that he was denied

¹ In ground one, Jones argues that the district court imposed a two-level increase in his offense level based upon the use of a computer to communicate with the victim, even though there was no evidence that he used a computer to communicate with her. In ground three, he argues that the district court imposed a two-level increase in his offense level based upon the exercise of undue influence over the victim, even though the victim was already an admitted prostitute before he engaged in conduct with her that violated the sex-trafficking statute. In petitioner's view, the fact that the victim was already a prostitute means that she did not need his influence, undue or otherwise, to engage in commercial sex acts.

the effective assistance of counsel due to his attorney's failure to object to the district court's purported errors in applying the sentencing guidelines (grounds two and four), and claims that he was denied the effective assistance of counsel because his attorney advised him to accept a plea agreement that was based upon a purportedly erroneous guideline calculation (ground five) and that included a collateral-attack waiver (grounds five and six).²

Relevant Law

The statutory provision on which Jones relies for his cause of action provides:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for

² There appears to be some overlap between grounds five and six. In ground five, Jones contends:

In this case, defense counsel was deficient in advising Affiant to accept a plea offer which (a) foreclosed all avenues available to a federal inmate for correcting any type of potential, unforeseen errors committed by any party; (b) contained sentencing enhancements which were inapplicable to Affiant; (c) where those errors prejudiced Affiant by increasing Affiant's exposure to punishment; and (d) precluded Affiant from obtaining relief [under] 28 U.S.C. § 2255 or any other provision.

Pet. (Doc. No. 1 at 16). In ground six, he asserts: "Affiant was also denied his Sixth Amendment right to effective counsel when counsel presented Affiant with and advised Affiant to accept a plea agreement which contained a 'collateral attack waiver' under an inherent 'conflict of interest.'" Id. at 20.

relief by motion pursuant to this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(e). While the First Circuit has not had many opportunities to develop its savings-clause jurisprudence, see Prieto v. FCI Berlin, No. 14-cv-00514-JL, 2015 WL 6690132, at *2 (D.N.H. Nov. 2, 2015), the Fourth Circuit has recently explained:

[A] prisoner "may file a habeas petition under § 2241 only if the collateral relief typically available under § 2255 'is inadequate or ineffective to test the legality of his detention.'" Prousalis v. Moore, 751 F.3d 272, 275 (4th Cir. 2014) (quoting 28 U.S.C. § 2255(e)). If a federal prisoner brings a § 2241 petition that does not fall within the scope of this "savings clause," then the district court must dismiss the "unauthorized habeas motion . . . for lack of jurisdiction," Rice v. Rivera, 617 F.3d 802, 807 (4th Cir. 2010).

United States v. Surratt, 797 F.3d 240, 247 (4th Cir. 2015), reh'g en banc granted (Dec. 2, 2015).

As for the circumstances under which the relief typically available under § 2255 may be inadequate or ineffective, the Surratt court continued:

We decided to award relief [in In re Jones, 226 F.3d 328, 329 (4th Cir. 2000)], deeming § 2255 "inadequate or ineffective to test the legality of a conviction" when:

(1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.

Jones, 226 F.3d at 333-34.

797 F.3d at 247. The court then went on to note that it, along with six other circuits "give substantial attention to the actual innocence aspect of Jones when discussing it." Id. (citations omitted); see also Sustache-Rivera v. United States, 221 F.3d 8, 16 (1st Cir. 2000) (noting that § 2255(e) "has most often been used as a vehicle to present an argument that, under a Supreme Court decision overruling the circuit courts as to the meaning of a statute, a prisoner is not guilty within the new meaning attributed to the statute") (citations omitted).

Discussion

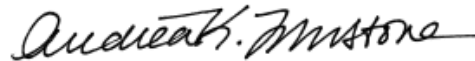
Respondent argues that this court lacks jurisdiction over Jones's petition because Jones is not entitled to the benefit of the § 2255(e) savings clause. As noted, petitioner has not objected to respondent's motion to dismiss. More importantly, nowhere in his petition does Jones identify any change in the substantive law that decriminalized the conduct for which he was

convicted. He raises other issues, but none that would entitle him to the benefit of the § 2255(e) savings clause. That, in turn, entitles respondent to dismissal of Jones's petition, for lack of jurisdiction.

Conclusion

For the reasons detailed above, respondent's motion to dismiss, doc. no. 12, should be granted.

Any objection to this report and recommendation must be filed within 14 days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). Failure to file an objection within the specified time waives the right to appeal the district court's order. See United States v. De Jesús-Viera, 655 F.3d 52, 57 (1st Cir. 2011); Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564 (1st Cir. 2010) (only issues fairly raised by objections to magistrate judge's report are subject to review by district court; issues not preserved by such objection are precluded on appeal).



Andrea K. Johnstone
United States Magistrate Judge

December 10, 2015

cc: Antonio Jones, pro se
Seth Aframe, Esq.